

COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004-2401
TEL 202 662 6000
FAX 202 662 6291
WWW COV COM

BEIJING
BRUSSELS
LONDON
NEW YORK
SAN DIEGO
SAN FRANCISCO
SI CON JAL FY
WASHINGTON

MICHAEL L. ROSENTHAL
TEL 202 662 6448
FAX 202 778 8448
MROSENTHAL@COV.COM



December 8, 2008

BY HAND

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 I. Street, SW
Washington, DC 20423-00001

ENTERED
Office of Proceedings

DEC - 8 2008

Part of
Public Record

224139

Re: Finance Docket No. 35087, Canadian National Railway Company and
Grand Trunk Corporation - Control - E.I.&E West Company

Dear Secretary Quinlan:

Enclosed for filing are an original and ten copies of the REDACTED version of Union Pacific's Petition to Enjoin and Remedy Premature Exercise and Control by Canadian National Railway Company.

An additional paper copy of this filing is also enclosed. Please return a date-stamped copy to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

Enclosure

cc Parties of Record (with enclosure)

REDACTED -- TO BE FILED IN THE PUBLIC RECORD

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
- CONTROL -
EJ&E WEST COMPANY

**PETITION TO ENJOIN AND REMEDY
PREMATURE EXERCISE OF CONTROL
BY CANADIAN NATIONAL RAILWAY COMPANY**

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J. MICHAEL HEMMER
JOHN J. BRENNAN III
GABRIEL S. MEYER
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179

LINDA J. MORGAN
MICHAEL L. ROSENTHAL
Covington & Burling LLP
1201 Pennsylvania Avenue, N W
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Union Pacific Railroad Company

December 8, 2008

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35087

**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY**

**PETITION TO ENJOIN AND REMEDY
PREMATURE EXERCISE OF CONTROL
BY CANADIAN NATIONAL RAILWAY COMPANY**

I. INTRODUCTION

Canadian National Railway Company (“CN”) has unlawfully exercised premature control of Elgin, Joliet & Eastern Railway Company (“EJ&E”) by interfering with the efforts of EJ&E and Union Pacific Railroad Company (“UP”) to implement certain trackage rights that UP obtained in an August 18, 2003 agreement with EJ&E (the “2003 Agreement”).

Although CN has no lawful authority to control EJ&E, CN has insisted that EJ&E cease efforts to carry out its agreement with UP, and EJ&E has acceded to CN’s demand. As a result, UP has been unable to exercise the trackage rights granted by EJ&E.

Board precedent establishes that such willful and deliberate actions by an acquiring carrier to control prematurely the activities of the carrier to be acquired cannot be condoned.

UP asks the Board to enjoin CN from continuing its unlawful behavior and to direct EJ&E to continue working with UP to carry out the 2003 Agreement. To ensure that this remedy does not become moot if the Board approves CN’s Control Application, UP asks the Board to

prohibit CN from exercising management control of EJ&E until UP and EJ&E have agreed upon terms for implementing the trackage rights granted in the 2003 Agreement.

This Petition is supported by the accompanying Verified Statement of Bryce Bump, UP's Senior Director-Joint Facilities ("Bump VS").

II. BACKGROUND

A. The 2003 Agreement

In the 2003 Agreement, EJ&E granted UP trackage rights over portions of EJ&E trackage from Joliet, Illinois, to Kirk Yard in Pine Junction, Indiana, that were not covered by prior trackage rights agreements between UP and EJ&E. {

}¹

UP had previously obtained trackage rights over EJ&E from Waukegan, Illinois, to Joliet, Illinois (the "1998 Agreement"), and from Chicago Heights, Illinois, to Griffith, Indiana (the "1997 Agreement"). *See id* The 2003 Agreement thus closed the gaps in UP's trackage rights between Joliet and Chicago Heights and between Griffith and Kirk Yard. *See id*

The 2003 Agreement also contained several other important modifications to the parties' prior trackage rights arrangements. {

¹ Brackets are used to indicate material that has been deleted from the public version of this Petition and the accompanying Verified Statement.

}

The parties also agreed that UP could have EJ&E provide haulage over the trackage rights lines using EJ&E crews rather operate trackage rights trains using its own crews *See id*²

UP and EJ&E plainly recognize that the 2003 Agreement is binding on both parties UP has paid EJ&E {

}

B. Efforts To Institute Trackage Rights Operations Under the 2003 Agreement

In late 2007 and early 2008, UP became increasingly concerned with EJ&E's difficulties in providing crews for haulage trains moving over the lines involved in the 2003 Agreement. *See Bump VS* at 2. When EJ&E crews are not available, UP is forced to hold trains on its own tracks, creating congestion, and wait for EJ&E crews, because UP crews are not qualified to operate the trains over those lines. *See id* at 2-3.

In April 2008, UP told EJ&E that it wanted to exercise its right to operate using trackage rights so that it would not be dependant on EJ&E crews. {

² As Board decisions show, railroads sometimes obtain trackage rights and haulage rights over the same line, and then operate using haulage rights until they choose to exercise their trackage rights. *See, e.g., Canadian Nat'l Ry. Grand Trunk Corp. & Grand Trunk W R R – Control – Illinois Cent Corp. Chicago, Cent & Pac. R R, & Cedar River R R*, 4 S.T.B. 122, 137 n.57 (1999) (describing an agreement that gave a railroad the option to convert haulage rights into trackage rights), *Kansas City S Ry – Trackage Rights Exemption – Illinois Cent R R*, STB Finance Docket No. 34309 (STB served Feb. 10, 2003) (discussing railroad's conversion of haulage rights to trackage rights after operating for several years under haulage rights).

}

The parties then exchanged drafts and correspondence, as is typical in negotiating details

{

}

C. CN's Unlawful Interference

UP first learned that CN was playing a role in EJ&E's decision-making {

} Indeed, CN appeared to be

well aware of the 2003 Agreement: CN's correspondence with the Board's Section of Environmental Analysis described the UP traffic that was moving via EJ&E haulage pursuant to

the 2003 Agreement. *See id*³ CN never gave UP any indication that it would interfere with the discussions between UP and EJ&E *See* Bump VS at 4

However, CN's interference became crystal clear just a few days later. {

}

III. ARGUMENT

A rail carrier may not exercise control or management of another rail carrier without the approval and authorization of the Board. *See* 49 U.S.C § 11323. CN does not have authority to exercise control of EJ&E CN's direction to EJ&E not to carry out the terms of its 2003 Agreement with UP thus violate Section 11323 of Title 49. *See generally Gilbertville Trucking Co v United States*, 371 U S 115, 125 (1962) ("control" encompasses "every type of control in fact"); *United States v Marshall Transp Co* , 322 U S. 31, 38 (1944) (same).

A. CN Prematurely Exercised Control Of EJ&E

In this Petition, UP has presented affirmative evidence that CN dictated the actions taken by EJ&E with respect to the 2003 Agreement. {

³ *See* Letter from Paul A. Cunningham, Esq., to Victoria J. Rutson, Chief, Section of Environmental Analysis, p. 2 (March 26, 2008).

} The

evidence permits no reasonable conclusion other than that EJ&F was acting under outside control from CN. *Compare Santa Fe S Pac Corp -- Control -- S Pac Transp Co*, STB Finance Docket No. 30400 (Sub-No. 21) (STB served Dec. 10, 1996).

The serious nature of CN's violation is magnified, not mitigated, by the fact that CN's control application is pending before the Board. Board precedent requires the agency to be especially vigilant in guarding against the premature exercise of control, particularly when the actions constitute "a calculated and deliberate attempt" by the acquiring carrier "to influence to its own benefit the affairs" of the carrier to be acquired. *Eastern Freight Ways, Inc -- Investigation of Control -- Associated Transp., Inc*, 122 M C C 143, 157 (1975); *see also Union Pac Corp, Union Pac R R, & Missouri Pac R R -- Control & Merger -- S Pac Rail Corp, S Pac Transp Co, St Louis S W Ry, SPCSL Corp, & Denver & Rio Grande W R R*. STB Finance Docket No. 32760 (STB served Oct. 27, 1995) at 8 ("We are, of course, mindful of our responsibility to guard against unauthorized control of one carrier by another") A calculated and deliberate violation of the prohibition against the premature exercise of control "cannot be condoned" and must be "severely dealt with." *Eastern Freight Ways*. 122 M.C.C. at 157. Indeed, Board precedent establishes that such a violation will defeat a transaction unless "overriding public interest considerations plainly call for acting otherwise." *Id*, *see also Gilbertville Trucking*. 371 U.S. at 128 ("[control] violation may alone bar approval of a merger

unless, 'upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval'" (quoting *Central of Georgia Ry. Control*, 307 I.C.C. 39, 43 (1958))

The Board should not accept any claim by CN that its actions constitute a legitimate effort to protect its prospective interest in EJ&E. CN has no legitimate interest in preventing EJ&E and LP from carrying out their 2003 Agreement – an agreement that existed long before CN filed its Control Application.

An acquiring carrier that has obtained a substantial financial interest in another carrier has a legitimate interest in imposing certain restrictions on the other carrier to protect itself against a material change in conditions while a control application is pending. Thus, when an acquiring carrier purchases another carrier's shares and places them into a voting trust, the voting trust may prevent the other carrier from buying or selling significant assets or may allow the acquiring carrier veto certain other major corporate decisions. The agency has "not found these rudimentary negative restrictions to be unauthorized control." See *Union Pac. Corp. -- Request for Informal Opinion – Voting Trust Agreement*, ICC Finance Docket No. 32619 (ICC served Dec. 20, 1994) at 5.

However, CN has not acquired a substantial financial interest in EJ&E, and thus the justification for allowing CN to restrict EJ&E's actions are not present. CN has protected itself by *not* acquiring a financial interest in EJ&E and by structuring the Stock Purchase Agreement (the "SPA") so that CN is *not* obligated to close the transaction if EJ&E has substantially changed its position to the detriment of CN. See CN Control Application, p. 271 (SPA § 3.20, "No Changes Since Unaudited Balance Sheet Date"); *id.*, p. 286 (SPA § 6.2, "Truth of Representations and Warranties"); *id.*, p. 287 (SPA § 6.8, "No Material Adverse Effect").

CN's restrictions on EJ&E's dealings with UP are also unlike the "rudimentary negative restrictions" that the Board has allowed because carrying out the 2003 Agreement would not result in a material change to CN's planned transaction with EJ&E. EJ&E granted UP the trackage rights at issue long before CN agreed to acquire EJ&E. EJ&E was not materially changing its position to the detriment of CN; it was merely carrying out the 2003 Agreement.

In fact, CN does not even appear to have contemplated protecting itself against this type of situation in the SPA. Under the SPA, CN is not obligated to close unless EJ&E can warrant that it has not, since June 30, 2007, "entered into any agreements pursuant to which [EJ&E] is obligated to provide or entitled to receive access or services, including trackage, haulage, and run-through power rights or agreements, to or from another rail or transportation services provider." CN Application, p. 273 (SPA § 3.20(p)). However, EJ&E was not attempting to enter into any such agreement. EJ&E granted UP trackage rights in the 2003 Agreement. Moreover, CN presumably knew about the 2003 Agreement when it signed the SPA, because EJ&E was required to disclose contracts "pursuant to which [EJ&E] is obligated to provide or entitled to receive access or services, including trackage, haulage and run-through power rights, to or from another rail or transportation services or access provider." CN Application, p. 267 (SPA § 3.10(xviii)). If EJ&E failed to disclose the 2003 Agreement to CN, CN may have a claim against EJ&E, but it has no right to interfere with UP's contractual rights.

CN has plainly violated Section 11323, and its violation is not excused by any prospective interest in EJ&E created by its Control Application.

B. The Board Should Impose A Remedy That Counteracts The Harm Caused By CN's Violation

The Board has the authority to impose an appropriate remedy for CN's conduct, up to and including denial of CN's Control Application. *Eastern Freight Ways*, 122 M.C.C. at 157.

The Board's remedial authority is not diminished by the fact that CN apparently controlled EJ&E "for only limited purposes." *Santa Fe S. Pac. Corp* at 6; see also *Kraus v Santa Fe S. Pac. Corp* , 878 F.2d 1193, 1198 (9th Cir. 1989) ("The [agency] has been given wide administrative discretion to tailor remedies and sanctions for violation of the statute and its own orders.").

UP is not asking the Board to deny CN's Control Application. However, UP is asking the Board to impose a remedy that will prevent CN from engaging in continuing misconduct and prevent CN from benefiting from its past misconduct with respect to the 2003 Agreement.

Specifically, UP requests that the Board enjoin CN from continuing its unlawful behavior and to direct EJ&E to continue working with UP to carry out the 2003 Agreement. In addition, to insure that this remedy does not become moot in the event that the Board approves CN's Control Application, UP asks the Board to prohibit CN from exercising management control of EJ&E until UP and EJ&E have agreed upon terms for implementing the trackage rights granted in the 2003 Agreement.⁴ In other words, UP would not object if the Board granted CN the approval necessary to consummate the transaction and acquire a financial interest in EJ&E. However, the Board should not allow CN to implement control over EJ&E's commercial and operating decisions, including EJ&E's dealings with UP, until UP and EJ&E have agreed upon terms for implementing the trackage rights granted in the 2003 Agreement and UP obtains Board authority to exercise those rights. The Board should retain jurisdiction over this matter until UP obtains Board authority to exercise the trackage rights granted in the 2003 Agreement.

⁴ The Board should also instruct CN not to retaliate in any manner against EJ&E personnel who implement the Board's instruction that EJ&E negotiate with UP, should the Board approve CN's Control Application.

UP's Petition and its proposed remedy have no impact whatsoever on the Final Environmental Impact Statement issued last week by the Board. As discussed above, UP's current haulage operations over EJ&E were considered in the environmental analysis. Converting those operations into trackage rights would have no affect on the environment, altering only the identity of the crew members operating the trains. In addition, UP warrants that it has no current plans to route additional trains over the EJ&E lines at issue here. Just as CN/EJ&E's traffic may fluctuate in the future as market conditions change, UP may find additional "opportunities as they develop." UP's present plans, however, call only for converting haulage trains that the Board already considered to trackage rights trains.

UP and EJ&E should be able to conclude their dealings rapidly. The parties have five years of experience operating under the 2003 Agreement, except that UP had been using EJ&E haulage rather than its trackage rights. {

} Once UP and EJ&E agree upon final terms for implementing the new trackage rights, UP will be able to obtain Board authority promptly under 49 C.F.R. § 1180.2(d)(7).

IV. CONCLUSION

The Board should enjoin CN from continuing its unlawful behavior and impose a remedy that provides appropriate relief to UP.

Respectfully submitted,



J. MICHAEL HEMMER
JOHN J. BRENNAN III
GABRIEL S. MEYER
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179

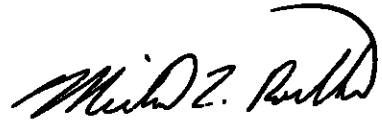
LINDA J. MORGAN
MICHAEL L. ROSENTHAL
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Union Pacific Railroad Company

December 8, 2008

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on December 8, 2008, I caused the foregoing Petition to Enjoin and Remedy Premature Exercise of Control to be served via first class mail, postage prepaid, or by a more expedition method of delivery, on all Parties of Record in Finance Docket No 35087.

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal", written over a horizontal line.

Michael L. Rosenthal

VERIFIED STATEMENT

OF

BRYCE B. BUMP

My name is Bryce B. Bump. I am Senior Director-Joint Facilities for Union Pacific Railroad Company ("UP"). As Senior Director-Joint Facilities, my responsibilities include developing, negotiating, and implementing joint facility arrangements, including haulage, trackage rights, interchange, and other operating agreements, with railroads in UP's Northern Region, which include Elgin, Joliet & Eastern Railway Company ("EJ&E"). This verified statement addresses my involvement with one particular joint facility agreement that I negotiated and have worked to implement: the trackage rights agreement that UP and EJ&E entered on August 18, 2003 (the "2003 Agreement"). The 2003 Agreement arose because EJ&E was aggressively marketing its route for use by other railroads.

In the 2003 Agreement, EJ&E granted UP trackage rights over portions of EJ&E trackage from Joliet, Illinois, to Kirk Yard in Pine Junction, Indiana, that were not covered by prior trackage rights agreements between UP and EJ&E. {

} (A copy of the 2003 Agreement is attached hereto as Exhibit A)

UP had previously obtained trackage rights over EJ&E's trackage from Waukegan, Illinois, to Joliet, Illinois (the "1998 Agreement"), and from Chicago Heights, Illinois, to Griffith, Indiana (the "1997 Agreement") The 2003 Agreement was designed to close the gaps in UP's trackage rights between Joliet and Chicago Heights and between Griffith and Kirk Yard (A map of EJ&E's trackage are attached to this statement as Exhibit B)

The 2003 Agreement also contained several other important modifications to the parties' prior trackage rights arrangements. {

}

UP and EJ&E plainly have recognized that the 2003 Agreement is binding on both parties. {

}

A. UP's Effort To Institute Trackage Rights Operations

In 2008, UP began the process of converting its haulage operations to trackage rights operations. In late 2007 and early 2008, UP became increasingly concerned with EJ&E's difficulties in providing crews for haulage trains moving over the lines involved in the 2003 Agreement. When EJ&E crews are not available, UP is forced to hold trains on its own tracks,

creating congestion, and wait for EJ&E crews, because UP crews are not qualified to operate the trains over those lines

In April 2008, UP met with EJ&E and advised that it wanted to exercise its right to operate using trackage rights so that it would not be dependant on EJ&E crews. {

}

Over the next few months, Mr. Danzl and I exchanged drafts and correspondence as we worked to iron out the details of an amendment to the 1998 Agreement. {

}

B. CN's Interference In UP's Dealings with EJ&E

I first learned that CN was playing a role in EJ&E's decision-making {

}

I had known that CN was aware of the trackage rights issue. CN's correspondence with the Board in this proceeding shows that CN was aware of UP's rights under the 2003 Agreement. Specifically, CN's correspondence with the Board's Section of Environmental Analysis describes the UP traffic that was moving via EJ&F haulage pursuant to the 2003 Agreement. (See Letter from Paul A. Cunningham, Esq., to Victoria J. Rutson, Chief, Section of Environmental Analysis, p. 2 (March 26, 2008), attached hereto as Exhibit H.)

{

} CN never gave me any indication that it would interfere with the discussions between UP and EJ&F:

However, CN's intentions became clear just a few days later {


}

VERIFICATION

I, Bryce B. Bump, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on December 8, 2008.



Bryce B. Bump

EXHIBIT A

REDACTED

EXHIBIT B

EJ&E And Other Chicago Routes

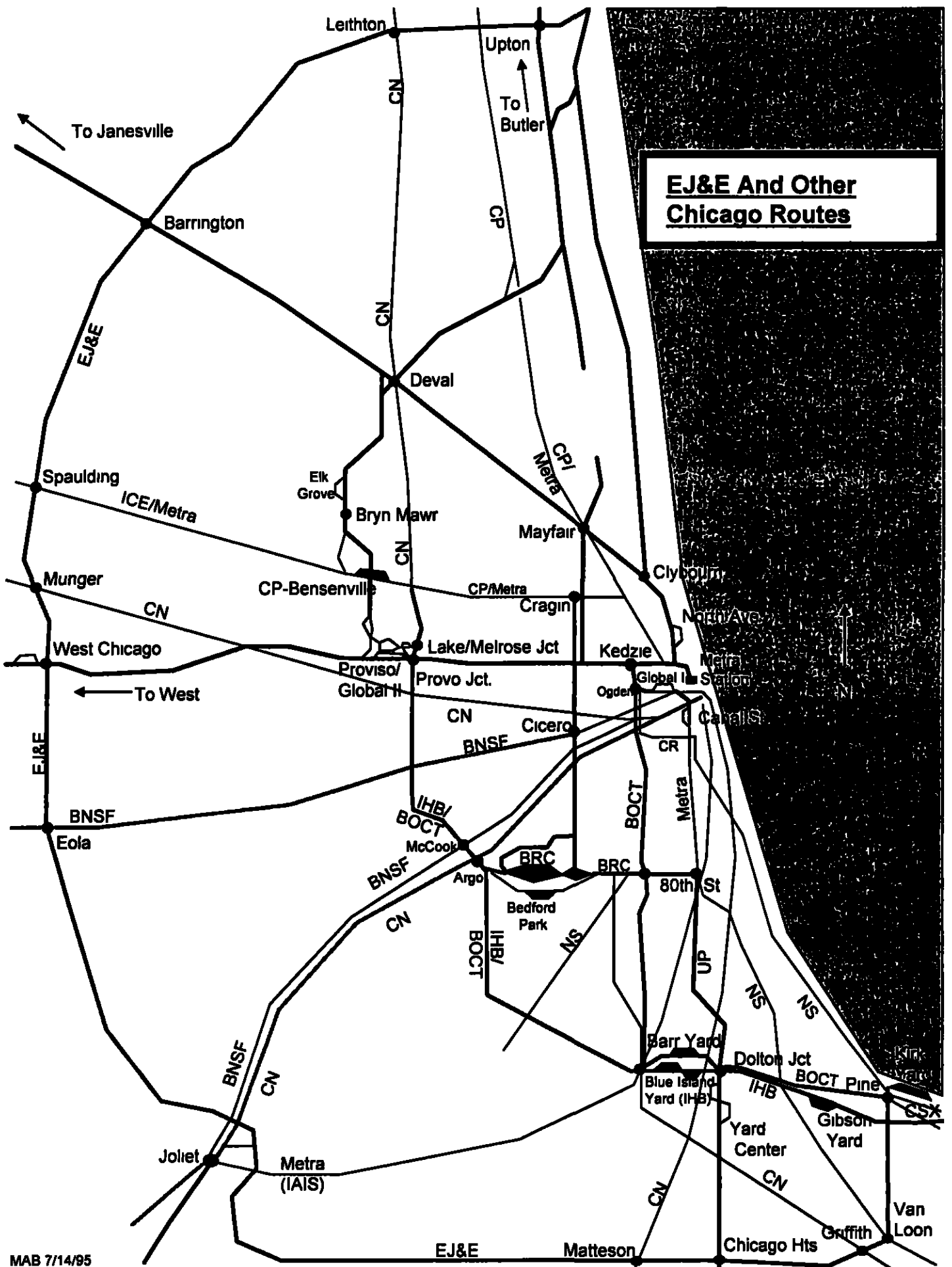


EXHIBIT C

REDACTED

EXHIBIT D

REDACTED

EXHIBIT E

REDACTED

EXHIBIT F

REDACTED

EXHIBIT G

REDACTED

EXHIBIT H

HARKINS CUNNINGHAM LLP

Attorneys at Law

Paul A. Cunningham
202.973.7601
pac@harkinscunningham.com

1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
Telephone 202.973.7600
Facsimile 202.973.7610

March 26, 2008

BY HAND

Ms. Victoria J. Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: *Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company (STB Finance Docket No. 35087)*

Dear Ms. Rutson:

I am writing, on behalf of Applicants Canadian National Railway Company and Grand Trunk Corporation (together, "Applicants"; together with their rail carrier subsidiaries, "CN"), to provide you and HDR Engineering, Inc. ("HDR"), with the responses to the items identified as "High Priority Information Requests" in your Data and Information Request #2, which you sent as an enclosure to your letter of March 7, 2008, to Normand Pellerin of CN. As indicated in my letter to you of March 21, 2008, responses to some of these items were provided in my responses to your first Data and Information Request, which you sent as an enclosure to your letter of December 18, 2007, to Mr. Pellerin.

1. Please provide additional information and clarification on the trackage and/or haulage rights agreements between EJ&E and other rail carriers. Are these rights transferable? What are the lengths, tonnages, number of cars, and types of commodities and frequencies of movements by other rail carriers operating upon the EJE system? Where specifically are these trains operated?

BNSF Trackage Rights. Under a trackage rights agreement with EJ&E, BNSF may operate up to ten trains a day in either direction between Eola, IL (East Siding), and Joliet, IL (Bridge Junction). The trains operated are primarily intermodal and vehicle trains, which may not exceed 8,000 feet in length without prior approval of EJ&E. This agreement includes a provision that bars BNSF from assigning its rights, except under certain specified conditions.

HARKINS CUNNINGHAM LLP

Attorneys at Law

Ms. Victoria J. Rutson, Chief

March 26, 2008

Page 2

CN Trackage Rights. Under trackage rights agreements with EJ&E, CN may operate trains in either direction between Griffith, IN, and Eola, IL (primarily between Griffith, IN, and Matteson, IL), and between Munger, IL, and Leithton, IL, with no limitation on number of train movements. Trains operated are general merchandise trains which may not exceed 8,000 feet in length without prior approval of EJ&E. These agreements contain provisions that bar CN from assigning its rights under the agreements, except under certain specified conditions.

IHB-EJ&E Joint Trackage Rights. EJ&E and IHB have granted each other trackage rights in the Calumet District (EJ&E Whiting Line) to serve jointly served customers. IHB has trackage rights on EJ&E's Lake Front Line to serve jointly served customers.

UP Trackage Rights. Under trackage rights agreements with EJ&E, UP may operate trains in either direction between Joliet, IL, and Waukegan, IL (trains currently operate between Joliet, IL, and West Chicago, IL), and between Griffith, IN, and Chicago Heights, IL, with no limitations on number train movements. Trains operated between Joliet, IL, and Waukegan, IL, include loaded and empty unit coal trains and empty vehicle trains. Trains operated between Griffith, IN, and Chicago Heights, IL, are primarily empty vehicle trains.

In addition, UP has moved loaded and empty unit coal trains under trackage rights between Chicago Heights, IL and Griffith, IN, for interchange with the CSS&SB at Goff, IN. EJ&E acts as an intermediate switch road moving trains between Griffith and Goff.

These agreements contain provisions that bar UP from assigning its rights under the agreements, except under certain specified conditions, without EJ&E's prior written consent.

UP Haulage. Under a haulage agreement with UP, EJ&E crews move trains on behalf of UP from various interchanges to various interchanges. Current business includes loaded unit coal trains and empty vehicle trains from West Chicago, IL, to CN at Griffith, IN, and loaded unit coal trains from West Chicago, IL, to CSS&SB at Goff, IN, including the return of the empty unit trains from Goff, IN, to West Chicago, IL. The agreement does not contain an explicit provision regarding assignability.

As I indicated you in my letter to you of March 21, 2008, Exhibit A to my letter to you of February 15, 2008, contains information regarding length, tonnages, and frequency of operation of, and number of cars in, trains operating on EJ&E segments between Leithton and Gary by virtue of trackage rights granted by EJ&E. Information about trains moved by EJ&E under haulage agreements was grouped with the information on non-CN trackage rights trains and reported under the heading of "Other Trains" in Exhibit A to my February 15, 2008, letter.

EXHIBIT I

REDACTED